In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 312

THE UNITED STATES, PETITIONER

v.

THE OHIO POWER COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR REHEARING

The Solicitor General, on behalf of the United States, requests that this Court reconsider its order of October 17, 1955, denying the petition for a writ of certiorari, and that further consideration of this case be deferred pending the decision of a case now before the Court of Appeals for the Second Circuit involving the identical issue here presented.

As the principal reason for granting the petition in the instant case, we stated (Pet. 4-7) that the decision below was in conflict with the decision of the Court of Appeals for the District of Columbia in *United States Graphite Co.* v. *Sawyer*, 176

F. 2d 868, affirming, *per curiam, United States Graphite Co.* v. *Harriman,* 71 F. Supp. 944, certiorari denied, 339 U.S. 904. The taxpayer in its brief in opposition (pp. 10-12) denied the existence of a conflict, contending that the present case was a tax refund proceeding whereas the District of Columbia case was a mandamus action. The denial of the petition, despite the substantial sums involved in the numerous cases pending on this issue (Pet. 7-8), suggests that the Court may have agreed with the taxpayer that no direct conflict was presented.

The most recent decision involving the War Production Board's authority to certify only part of the cost of a new facility is that of the Tax Court in *National Lead Co.* v. *Commissioner,* 23 T.C. 988, where that court agreed with the interpretation of the Court of Claims herein and with Judge Miller's dissent in the *Graphite* case. Judge Opper dissented, relying on the majority decision in the *Graphite* case and the dissent of Chief Judge Jones of the Court of Claims in the instant case.

On September 14, 1955, the Commissioner filed a petition for review of the *National Lead* decision in the Court of Appeals for the Second Circuit, and the case is now pending there. Since both parties are anxious to obtain an early decision, the case will be expeditiously handled, and it is likely that there will be a decision by early next year. As pointed out in our petition, the District Court for the District of Columbia as well as a majority of the Court of Appeals for the District of Colum-

bia have adopted the interpretation for which we contend, and every decision on the question has been a divided one. These factors, we respectfully submit, make it more than a mere possibility that the Second Circuit may reverse the Tax Court, thus creating a square conflict with the decision below. In that eventuality, vacation of the order denying certiorari and issuance of the writ would be warranted (*Clark* v. *Manufacturers Trust Co.*, 337 U.S. 953, 338 U.S. 241; *Sanitary Refrig'r Co.* v. *Winters*, 280 U.S. 30, 34, fn. 1).

In filing this petition the Government is fully mindful of the considerations which ordinarily militate against rehearing. If this were an ordinary case, the Government would, of course, accept the finality of decision implicit in the denial of certiorari, and would not press for further consideration of the matter. However, we believe that the circumstances here presented are exceptional. As noted in the petition (pp. 7-8), there is a large number of pending cases involving this issue, and the total claims may run to more than 60 million dollars. Despite the denial of certiorari, these claims will continue to be asserted and contested. If a direct conflict of decisions should develop within the near future, prior to the expiration of the current term, the Court could definitely settle the question and thus avoid needless and protracted litigation in the lower courts. We submit that the interests of expeditious determination of the issue as well as protection of the revenue require that the instant case—particularly in view of the very

large tax refund involved—be kept open, to await the outcome of the pending *National Lead* case in the Second Circuit.[1]

Respectfully submitted,

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NOVEMBER, 1955.

CERTIFICATE OF COUNSEL

As required by Rule 58, I certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in that rule.

SIMON E. SOBELOFF,
Solicitor General.

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[1] Cf. *United States* v. *Olympic Radio & Television, Inc.*, 349 U.S. 232, 233, in which certiorari was granted "because of a conflict between the decision below [of the Court of Claims] and *Lewyt Corp.* v. *Commissioner*, 215 F. 2d 518, decided by the Court of Appeals for the Second Circuit." The *Olympic* petition for certiorari was filed on May 29, 1953; the *Lewyt* case was decided by the Second Circuit on July 14, 1954; and certiorari was granted in *Olympic* on October 14, 1954 (348 U.S. 808).

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MEMORANDUM IN OPPOSITION TO PETITIONER'S REQUEST FOR DEFERMENT OF ACTION ON ITS PETITION FOR REHEARING

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